Supreme Court, U.S.
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No. 99-422

IN THE

Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

PROBATE PROCEEDING, WILL OF
ABRAHAM WARSASKI, DECEASED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

SUPPLEMENTAL BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

This supplemental brief is being submitted in opposition to the brief of Amici denominated in the brief as "concerned Illinois lawyers and law professors" ("Amici") in accordance with Rule 15.8 of the Rules of the Supreme Court of the United States. In a desperate effort to find a Constitutional basis for Petitioner, Marshall Spiegel's ("Petitioner") claim, the Amici contort legal principals and intentionally misstate relevant facts. In addition, Amici make statements which are not to be found anywhere in the record.

As will be more fully detailed below, neither *Powell v. Alabama*, 287 U.S. 45 (1932) nor any of the other cases decided by this Court have any applicability to this situation, where a trial court exercised its discretion in denying Petitioner's application for a *pro hac vice* admission of an out-of-state attorney based upon such attorney's insistence upon an adjournment of a previously scheduled firm trial date. Both *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968); and *United States v. Panzardi Alvarez*, 816 F.2d 813 (1st Cir. 1987) invalidated state statutes limiting *pro hac vice* appearances to one per attorney per annum. No such prohibition is at issue in this case.

Further, by intentionally misstating facts, the Amici give the impression that the denial of Petitioner's application for *pro hac vice* admission of Mr. Meenan was determined at the eleventh (11th) hour. As will be detailed below, nothing could be further from the truth. Indeed, Amici omit a copy of the August 6, 1997 Decision and Order of the Surrogate denying Mr. Meenan's admission, an Order which was issued a month prior to the trial date. This Order stated quite

explicitly that the application for *pro hac vice* admission was being denied, inasmuch as Mr. Meenan had sought an adjournment of the firm trial date (*see* Resp. Supp. App. 1a-2a annexed hereto).[1]

Significantly, Amici concede, as they must, that Petitioner never raised a Constitutional argument either at the Surrogate Court level, Intermediate Appellate level or to the New York Court of Appeals. Instead, it is raised for the first time on this application for certiorari. Further, it is *undisputed* that Petitioner never perfected an appeal from the interlocutory order of the Surrogate with respect to the denial of Mr. Meenan's admission, as was his right under applicable New York State procedural law. It is equally *undisputed* that Petitioner did not seek a stay of the trial, from either the Surrogate Court or upon application to the Appellate Division of the Supreme Court, staying the trial pending a determination of the issue of Mr. Meenan's admission. Hence, for all of the foregoing reasons, as well as those set forth below and in the respondent's brief in opposition to the petition for certiorari, it is respectfully submitted that the petition for a writ of certiorari be denied in all respects.

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1. References to "Resp. Supp. App." refers to the Respondent's Supplemental Appendix annexed hereto.

FURTHER REASONS FOR DENYING THE WRIT

I.

PETITIONER FAILED TO RAISE OR ADDRESS THE ISSUE OF FEDERAL DUE PROCESS VIOLATION IN THE STATE COURT PROCEEDINGS.

This issue is adequately addressed in Respondent's Brief in Opposition and for the reasons set forth therein it is respectfully submitted there is no basis for this Court to exercise its jurisdiction. Moreover, the Amici fails even to address this fatal flaw in Petitioner's application.

II.

THE TRIAL COURT'S DENIAL OF OUT-OF-STATE COUNSEL'S APPLICATION FOR ADMISSION *PRO HAC VICE*, WHICH WAS COUPLED WITH HIS REQUEST FOR AN ADJOURNMENT OF A FIRM TRIAL DATE, WAS A VALID EXERCISE OF DISCRETION.

The thrust of the Amici's argument is that by denying Petitioner's application for the *pro hac vice* admission of Mr. Meenan, the Court deprived him of due process. This argument is without merit.[2] The Amici further intentionally

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2. It is interesting to note that while professor Thomas indicates that the Amici, to wit: "Concerned Illinois Lawyers and Law Professors" is [sic] a "diverse group of lawyers and law professors who practice and teach in Chicago" no such list is attached to the Amicus brief. This is particularly interesting since Professor Thomas further states; pursuant to Supreme Court Rule 37.6 that "he has authored

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misstate other material facts. For instance, the Amici speciously claim, on Page 12 of their brief, that the Appellate Division listed a different reason for denying Mr. Meenan's application his request for a four-day adjournment. As noted in the Resp. Supp. App. 3a, in denying Mr. Meenan's application, the Surrogate Court stated:

> The motion to admit out of state counsel *and request for an adjournment of the upcoming trial in order to accommodate his schedule is denied.* Counsel shall proceed with jury selection on September 5, 1997 at 10:00 a.m. and the trial on September 8, 1997. (emphasis supplied).

Thus, the Appellate Division was simply affirming the discretionary decision of the Surrogate's Court. In this regard, it is important to keep in mind the fact that the matter had been pending close to four (4) years. Moreover, the chronology of events is not as Amici seek to portray it. On May 29, 1997, the Surrogate granted the application of Richard Leng to be relieved as counsel. On June 20, 1997, Mr. Meenan, through the retained local counsel, Joanne Rowland sought leave for admission *pro hac vice*. On August 6, 1997, the Surrogate denied Mr. Meenan's application based on his application for yet another adjournment for the trial.

(Cont'd)

this brief in whole, and that no person or entity has made a monetary contribution to the preparation and submission of the brief". Previously, during the course certain colloquy between counsel at the trial of this proceeding, Professor Thomas was mentioned as having given expert advice to the Petitioner during the course of trial. One can only wonder as to whether Professor Thomas was paid by Petitioner for these services or, alternatively, they were provided *pro bono* (*see* Resp. Supp. App. 3a).

It is *undisputed* that no appeals or other actions were taken by Petitioner between August 6 and September 5, 1997 with respect to the order denying the Petitioner's application to admit Mr. Meenan *pro hac vice*. Pursuant to applicable New York State procedural law, Petitioner could have sought a stay from either the Surrogate or the Appellate Division staying the trial pending the determination of an appeal (which Petitioner never sought) from the interlocutory order denying Mr. Meenan's admission. He did not. Nor, for that matter, was the issue of the denial of Petitioner's application to admit Mr. Meenan raised during the series of motions which Petitioner made at the commencement of the trial on September 5, 1997. Parenthetically, the Court will note that during this colloquy Professor Thomas' name was raised as an individual who had counseled Petitioner with respect to the trial. (*See* Resp. Supp. App. 3a).

Further, Petitioner's specious argument that he had "an overriding need for Mr. Meenan's representation" is patently absurd. The sole issue before the Surrogate's Court was whether the decedent was suffering from insane delusions which affected his testamentary capacity to make a will. The determination of this issue was governed solely by applicable New York Law.

Amici's further argument that Ms. Rowland "lacked fundamental trial experience" is not raised anywhere in the proceedings below at any level.[3] Respondent did not select Ms. Rowland. Petitioner, apparently in consultation with Mr.

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3. Respondent is unaware of any case law supporting the claim that "ineffective assistance of counsel" is a valid Constitutional argument with respect to a civil litigant. Even if it were, it is not raised by either Petitioner or Amici at any of the lower court proceedings or even on application to this Court.

Meenan, selected her. If, as claimed in conclusory fashion by Amici, she lacked the appropriate knowledge of New York's Deadman's Statute, then this is not a matter sufficient to justify the invocation this Court's Constitutional jurisdiction. All of the statements set forth at Pages 13 through 15 of Amici brief are dehors the record. Moreover, Amici has the temerity to insert matters concerning possible settlement negotiations into this brief. Respondent will not comment extensively on this issue other then to deny what Amici state, that they have no personal knowledge of any alleged settlement offer and that settlement negotiations are, in any event, supposed to be kept confidential between counsel and the litigants and not raised in any judicial proceedings.

CONCLUSION

Neither Petitioner, nor Amici raise any legitimate argument warranting the invocation of this Court's jurisdiction. There was no denial of due process rights by the Surrogate's discretionary determination, a month prior to trial, denying Mr. Meenan's application for *pro hac vice* admission. In any event, the Constitutional argument was not raised at either the trial or any intermediate Appellate levels and was not properly preserved for this Court's review.

Further, Petitioner made no attempt to secure judicial review of the Surrogate Court's August 6, 1997 ruling, nor did Petitioner seek a stay of the trial pending a determination of the issue of Mr. Meenan's application. Appellate review could have been sought on this interlocutory ruling, but was not. Amici's further arguments with regard to Ms. Rowland's representation are irrelevant, have no support in the record and are purely red herrings which represent a last ditch effort to seek this Court's sympathy, where none is deserved.

For the foregoing reasons, as well as those set forth in respondent's opposition brief, it is respectfully submitted that the application for a writ of certiorari be denied in all respects.

Respectfully submitted,

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APPENDIX

APPENDIX A — LETTER OF THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK DENYING MOTION TO ADMIT OUT OF STATE COUNSEL AND REQUEST FOR ADJOURNMENT OF TRIAL DATED AUGUST 6, 1997

SURROGATE'S COURT
OF THE
COUNTY OF NEW YORK

* * *

August 6, 1997

Joanne Rowland, Esq.
321 Broadway, 3rd Floor
New York, NY 10007

Steven E. Rosenfeld, Esq.
Stein, Garr & Rosenfeld
805 Third Avenue
New York, NY 10022

Re: *Estate of Abraham Warsaski — File No. 4323/93*

Dear Counsel:

The motion to admit out of state counsel and request for an adjournment of the upcoming trial in order to accommodate his schedule are denied. Counsel shall proceed with jury selection on September 5, 1997 at 10:00 a.m. and the trial on September 8, 1997.

Very truly yours,

s/ Colleen Carew
Colleen F. Carew
Principal Law Clerk to
Surrogate Renee R. Roth

APPENDIX B — EXCERPT FROM TRIAL TRANSCRIPT OF THE SURROGATE'S COURT OF THE CITY OF NEW YORK, NEW YORK COUNTY DATED SEPTEMBER 5, 1997

SURROGATES COURT OF THE CITY OF NEW YORK
NEW YORK COUNTY

Index No. 4323/93

HOWARD LEDER, as Preliminary Executor of the Estate of ABRAHAM WARSASKI,

Proponent,

– against –

MARSHALL SPIEGEL & MICHAEL SPIEGEL,

Objectants.

31 Chambers Street
New York, New York 10007
September 5, 1997

BEFORE:

HONORABLE RENEE ROTH,
Justice

* * *

MS. ROWLAND: The final motion is somewhat novel, also about the jury. I have been advised by professor Thomas, law professor at Chicago ITT Kent that the Batson rule has been expanded by two recent Supreme Court cases.

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